LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 21 1957
JOHN T. FEY, Clerk

No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN F. MULGAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER

v.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Summary of argument	5
Argument	8
I. Aliens convicted of narcotics offenses prior to the enactment of the Immigration and Nationality Act of 1952 are now deportable under that Act	10
A. The statutory language shows a clear congressional purpose to render prior narcotics offenses a present basis for deportation	10
B. The legislative history confirms the congressional purpose to render prior narcotics offenses a present basis for deportation	20
II. The mere failure of Congress prior to 1952 to provide for deportation with respect to a certain offense does not create a "status" of non deportability protected by Section 405(a) of the 1952 Act	24
Conclusion	30
Cases:	
Bertoldi v. *McGrath*, 178 F. 2d 977	25, 26
DeLuca, United States ex rel. v. *O'Rourke*, 213 F. 2d 759	18, 28
Eichenlaub v. *Shaughnessy*, 338 U. S. 521	27
Gagliano v. *Bonds*, 222 F. 2d 958, certiorari denied, 350 U. S. 902	7, 18
Galvan v. *Press*, 347 U. S. 522	27
Harisiades v. *Shaughnessy*, 342 U. S. 580	27
Lehmann v. *United States ex rel. Carson*, pending on writ of certiorari, No. 72, this Term	18, 21; 23, 27, 28
Mahler v. *Eby*, 264 U. S. 32	27
Marcello v. *Bonds*, 349 U. S. 302	7, 16, 17, 18, 19, 27
Ng Fung Ho v. *White*, 259 U. S. 276	27
Pino v. *Nicolls*, 215 F. 2d 237, reversed on other grounds, sub nom. *Pino* v. *Landon*, 349 U. S. 901	19

Cases—Continued. Page.

Shomberg v. *United States*, 348 U. S. 540 ..... 6, 7, 13, 15, 16
United States v. *Menasche*, 348 U. S. 528 ..... 8, 13, 14, 22, 25, 26
United States v. *Minker*, 350 U. S. 179 12
Wong Kay Suey v. *Brownell*, 227 F. 2d 41, certiorari denied; 350 U. S. 969 19

Statutes:

Immigration and Nationality Act of 1952:
Section 241 [66 Stat. 206; 8 U. S. C. 1251] 2, 6, 29
Subsection (a) (3) 10, 11
Subsection (a) (11) 2, 5, 7, 8, 9, 10, 11, 13, 18, 21, 25
Subsection (b) 18
Subsection (c) 11
Subsection (d) 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 22, 24, 25
Section 316 (a) (66 Stat. 242, 8 U. S. C. 1427 (a)) 14
Section 318 (66 Stat. 244, 8 U. S. C. 1429) 6, 15, 20
Section 360 (a) 19
Section 405 (a) [66 Stat. 280, 8 U. S. C. 1101, Note] 3, 5, 6, 7, 9, 11, 12, 14, 15, 24, 25
Section 405 (b) [66 Stat. 280, 8 U. S. C. 1101, Note] 7, 14, 15
Marihuana Tax Act, 26 U. S. C. 2591 16

Miscellaneous:

H. Rept. No. 1365, 82d Cong., 2d Sess 21, 23, 24, 29
Pub. L. 728, 84th Cong., 2d Sess., Sec. 301 (c) 18
S. 716, 82d Cong., 1st Sess 21, 22
S. 3455, 81st Cong., 2d Sess 21, 22
S. Rept. 1997, H. Rept. No. 2546, 84th Cong., 2d Sess 18
S. Rept. 1137, 82d Cong., 2d Sess 21, 23
S. Rept. No. 1515, 81st Cong., 2d Sess 20

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 435

JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER[1]

v.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 20–25) is reported at 236 F. 2d 955.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1956 (R. 19). The petition for a writ of certiorari was filed on September 19, 1956, and was granted on November 19, 1956 (R. 25). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

[1] John F. Mulcahey was, on June 15, 1956, substituted for James W. Butterfield, who had been District Director at the time the petition for habeas corpus was filed (R. 19).

QUESTION PRESENTED

Whether an alien, convicted of a narcotics violation prior to the Immigration and Nationality Act of 1952, and not deportable therefor prior to that Act, has a protected "status" of nondeportability under the savings clause of the 1952 Act, Section 405 (a), despite the provisions of Section 241 which make such conviction a ground for deportation and which expressly make this ground retroactive "[e]xcept as otherwise specifically provided in this section."

STATUTES INVOLVED

The Immigration and Nationality Act of 1952 provides:

> Section 241 [66 Stat. 206; 8 U. S. C. 1251]:
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or

isonipecaine or any addiction-forming or addiction-sustaining opiate * * *.

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 405 (a) [66 Stat. 280; 8 U. S. C. 1101, Note]:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically pro-

vided therein, hereby continued in force and effect. * * *

STATEMENT

Respondent, an alien who entered the United States in 1920 (R. 14), was convicted in 1925 of a federal offense relating to the illicit traffic in narcotic drugs, *i. e.*, sale of a quantity of cocaine hydrochloride and possession and purchase of 385 grains thereof (R. 9, 12 (par. 7), 13 (par. 3 and Order), 15). Pursuant to Sec. 241 (a) (11) and (d) of the Immigration and Nationality Act of 1952, he was ordered deported (R. 13–14).[2]

After respondent had been taken into custody for deportation, he challenged the order of deportation by a petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Michigan (R. 1–2). The District Court, after argument, denied the writ (R. 6).

The Court of Appeals reversed, holding (R. 24) that, since respondent's conviction for violation of the narcotics laws was not, in itself, a ground for deporta-

[2] The deportation proceedings first proceeded upon the basis of a 1952 conviction for violation of the federal narcotics laws and conviction of two crimes involving moral turpitude: a 1924 conviction for receiving stolen property, and a 1934 conviction for malicious threats to extort (R. 10). However, after the institution of the deportation proceedings, the Recorder's Court of Detroit permitted respondent, in 1954, to withdraw his 1924 plea of guilty and thereupon dismissed the case (R. 10). The 1952 federal conviction was reversed upon appeal (R. 10). The deportation proceedings were reopened and the further charge was lodged upon the basis of respondent's conviction in 1925 of violations of the federal narcotics laws (R. 15). It was upon this charge that the Special Inquiry Officer found respondent deportable (R. 13), and the Board of Immigration Appeals affirmed (R. 15, 18).

tion prior to the Immigration and Nationality Act of 1952,[3] respondent had a "status" of nondeportability which was preserved by the savings clause of the 1952 Act, Section 405 (a). The court held inapplicable the provision of Section 241 (a) (11), providing for the deportation of an alien "who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs," and made no mention of Section 241 (d), providing for the retroactive effect of Section 241 (a).

SUMMARY OF ARGUMENT

I

A. Section 241 (a) (11) of the Immigration and Nationality Act of 1952 provides for the deportation of any alien who "at any time has been convicted" of a narcotics offense, and Section 241 (d) makes the section applicable "notwithstanding" that the conviction occurred prior to the 1952 Act. This language is so emphatically retrospective that the savings clause of the 1952 Act, Section 405 (a), cannot come into play since Section 405 (a) by its own terms does not apply where it is otherwise specifically provided in the Act.

Subsection (d) of Section 241 deals explicitly with the question of whether there are to be *any* exceptions to the retrospective application of the provisions of subsection (a). Subsection (d) states that it shall make no difference that the factual basis of deportation predated the Act "[e]xcept as otherwise specifi-

[3] Prior to 1952, deportation could not be based on a single narcotics conviction.

cally provided *in this section*" (emphasis added). And there actually are exceptions in Section 241, expressed by the use of the word "hereafter," to which the above quoted language is applicable. Two conclusions follow, we believe. First, no exception was to be made to the retrospective effect of Section 241 (d) by reason of any provision other than provisions in "this section". Congress patently was not saying "this section" when it meant "this Act", particularly if it meant a general savings clause elsewhere in the "Act". Secondly, the exceptions within Section 241 demonstrate that to "specifically provide" an exception, in the pattern of draftsmanship of this Act, does not mean that any magic words such as "notwithstanding Subsection (d)" are required; the use of the word "hereafter" suffices, for example. Similarly, in order to provide an exception to the savings clause of Section 405 (a) under its own comparable words—"otherwise specifically provided"—it is not necessary that, in each of the instances where the savings clause is not to apply, there must be a ritualistic repetition of the words "notwithstanding the provisions of Section 405 (a)". A specific retrospective provision by its very nature constitutes a specific exception to a savings clause.

This Court so recognized in *Shomberg* v. *United States*, 348 U. S. 540, in holding that a provision barring a hearing on a naturalization petition pending a hearing on deportation was effective despite the failure, in the pertinent Section 318, specifically to except Section 405 (a) with a "notwithstanding" clause as was done in the same Section 318 with respect to Sec-

tion 405 (b). The Court relied upon the obvious "congressional purpose to override the savings clause."

Directly applicable to the instant case is *Marcello* v. *Bonds*, 349 U. S. 302, also involving deportation under the instant Section 241 (a) (11) by reason of a pre-1952 narcotics conviction. The issue of the applicability of the savings clause in Section 405 (a) was before this Court in that case not only in the specific holding of the Board of Immigration Appeals, but also in a special supplemental petition for certiorari exclusively directed to the point. Although this Court denied the supplemental petition (348 U. S. 805) and addressed its opinion to other issues, it presumably would not have passed on the constitutional validity of Section 241 (a) (11) under the *ex post facto* clause if there existed any doubt as to the retrospective nature of the statute. In fact, the Court's holding has been held to be a disposition of the issue (*Gagliano* v. *Bonds*, 222 F. 2d 958, 959 (C. A. 5), certiorari denied, 350 U. S. 902).

B. The legislative history supports the foregoing interpretation of the statute. Committee reports, as well as analyses prepared for the legislators by the Immigration Service, show a clear recognition of the retrospective effect of Section 241 (d) and likewise give no indication that the general savings clause was to countervail the express retrospective language in Section 241 (a) (11) concerning narcotics offenders.

II

For yet another reason, the savings clause of Section 405 (a) is of no avail to respondent. Respondent

41698°2—57——2

has not acquired a "status, condition, [or] right in process of acquisition" merely by the earlier forbearance of Congress to provide deportation for the particular crime of which he was convicted. The failure of Congress to take every action which it might constitutionally take with respect to an offense is not comparable to the affirmative tendering of a privilege to an alien as, for example, the naturalization provision involved in *United States* v. *Menasche*, 348 U. S. 528, in which Congress had provided that the taking of certain steps by the alien and the maintenance of residence for a certain number of years would eventuate in citizenship. Nothing in the legislative history of the Act nor in the language of the savings clause indicates that any "vested right" with respect to deportation was thought to have accrued to an alien in connection with his commission of an offense.

ARGUMENT

Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), requires the deportation of an alien who "*at any time* has been convicted" [emphasis added] of an offense relating to illicit traffic in narcotic drugs, or who "has been convicted" of an offense relating to sale or possession of drugs. Subsection (d) of the same section provides that, except as otherwise specifically provided "in this section", the provisions of the section shall be ap-

plicable "notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the [deportable] classes * * * occurred prior to the date of enactment of this Act."

Respondent was ordered deported under the foregoing provisions by reason of a conviction of an offense relating to illicit traffic in drugs, namely, a conviction of unlawful sale of a quantity of cocaine hydrochloride and of possession and purchase of 385 grains of that drug. He contends, in essence, that since the conviction occurred prior to enactment of the 1952 Act and since Congress had not provided for deportation for that offense prior to the 1952 Act he had a nondeportable status that was preserved by the general savings clause of the 1952 Act, Section 405 (a) (*supra*, pp. 3–4).

The contention is erroneous in two respects. First, the savings clause, by its own terms, does not apply where the 1952 Act has "otherwise specifically provided". In this case, the Act does otherwise provide by the very specific retrospective provisions of subsections (a) (11) and (d) of Section 241. Secondly, even if the savings clause were not thus specifically conditioned, the mere inaction of Congress, prior to 1952, concerning the particular offense committed by respondent created no status, condition, right in process of acquisition, or other thing intended to be preserved by the savings clause.

I

ALIENS CONVICTED OF NARCOTICS OFFENSES PRIOR TO THE ENACTMENT OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 ARE NOW DEPORTABLE UNDER THAT ACT

A. The statutory language shows a clear congressional purpose to render prior narcotics offenses a present basis for deportation.

Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), provides that any alien shall be deported—

> who *at any time has been* convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who *has been* convicted of a violation of any law or regulation governing or controlling the taxing, * * * sale, * * * or the possession for the purpose of * * * sale * * * of * * * [drugs] * * *. [Emphasis added.]

Section 241 (d) further provides that—

> Except as otherwise specifically provided *in this section* [Sec. 241], the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), *notwithstanding* * * * *that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.* [Emphasis added.]

Section 241 contains specific exceptions to the retroactive effect of its subsection (d), but none of these apply to the conviction here involved. The exceptions within Section 241 relate to an alien who becomes institutionalized "hereafter" (subsection (a)

(3)); to an alien who "is, or hereafter" is a drug addict (subsection (a) (11)); and to an alien who "hereafter" employs a visa based upon a nominal marriage (subsection (c)).

The language of Section 241 (a) (11) and (d) seems clearly to express a congressional purpose to make prior narcotic offenses a present basis for deportation under the 1952 Act, and therefore to constitute a provision which "otherwise specifically provide[s]" so as to render inoperative the general savings clause of Section 405 (a) (*supra*, pp. 3–4), assuming (what we do not concede) that Section 405 (a) would apply here in the absence of a specific provision otherwise. There is, first of all, the reference in Section 241 (a) (11) to any alien who "*at any time has been* convicted" as to illicit traffic or "*has been* convicted" as to other specific offenses. The use of the perfect tense in these clauses, particularly when contrasted with the use in the very same subsection of the present as well as the perfect tense (in providing for the deportation of an alien who "is, or hereafter at any time after entry has been" an addict), in itself speaks eloquently of the intent to make past convictions for narcotics offenses a basis of deportation.

In addition, there is the reinforcing language of Section 241 (d) that "except as otherwise specifically provided *in this section*" [emphasis added] the grounds for deportation set forth therein shall apply notwithstanding that the factual basis for the deportation pre-dated the 1952 Act. Congress was not inadvertently using language which restricted exceptions

to *this section* while actually meaning the exceptions contained in a general savings clause elsewhere *in the Act.* Had there been no specific exceptions within the section itself, some search elsewhere for the exceptions might be warranted. But when Congress stated that only exceptions "specifically provided in this section" shall prevent deportation for matters that "occurred prior to the date of enactment of this Act", and when such specific exceptions are to be found within the section, the legislative intent is unmistakable. There is no warrant for seeking to countermand this precise language by more general language elsewhere at a distant point in the statute. Cf. *United States* v. *Minker*, 350 U. S. 179, 186, where this Court noted that "when the reference is to a section, that word is employed" and that "[no] justification appears for treating 'Act' in § 235 (a) as meaning 'section.'" Conversely, no justification appears for treating "section" as used in Section 241 (d) as meaning "Act."

Section 241 (d) also demonstrates that, in order to provide a specific exception to a general clause which contains the language "except as otherwise specifically provided", it is not necessary that any particular formula be used, such as "notwithstanding the provisions of Section 241 (d)". As we have just pointed out, exceptions to 241 (d) were made by the simple use of the word "hereafter". Similarly, to create an exception under the "except as otherwise specifically provided" clause of the general savings clause, Section 405 (a), no set formula like "notwithstanding the provisions of Section 405 (a)" is needed. In some instances in the Act, specific exclusion of the

effect of a provision, designating it by its number, may well have been desirable, and there are instances of such drafting in the Act. But any clear expression of congressional intent to render the general savings clause inoperable is sufficient. Section 241 (a) (11) and (d) "otherwise specifically provide[s]" to the full degree of draftsmanship required to take this case out of the general savings clause. No other meaning can reasonably be attributed to the language of Section 241 (d) precisely stating that the deportation provisions of that section shall prevail even though the facts involved "occurred prior to the date of enactment of this Act."

This Court in *United States* v. *Menasche*, 348 U. S. 528, recognized the wide scope to be given the savings clause and held, in essence, that a clear expression of congressional intent is necessary to render it inapplicable. But in its decision in *Shomberg* v. *United States*, 348 U. S. 540, 547–548, decided the same day as *Menasche*, the Court also noted:

> We would be lax in our duty if we did not give recognition also to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the *status quo*. * * *

The interrelation of these two principles is illustrated by the facts in *Menasche* and *Shomberg*, both of which involved petitions for naturalization.

The question in *Menasche* (348 U. S. 528) was whether an alien who had commenced his five-year period of residence prior to the 1952 Act would now be subject to the new requirement of physical pres-

ence within the United States for at least one-half of the residence period.[4] That new requirement was stated in language that (unlike Section 241 (d), here involved) contained no reference at all to its prospective or retroactive effect. The Government's contention that the savings clause was inapplicable was based on subsection (b) of Section 405[5] which provided that petitions for naturalization theretofore filed which were pending at the time the Act took effect should be determined by prior law. The Government argued that subsection (b) of Section 405 took all petitions for naturalization out of Section

[4] The pertinent text of the provision, Section 316 (a) (66 Stat. 242, 8 U. S. C. 1427 (a)) was:

"Sec. 316. (a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

[5] Subsection 405 (b) is as follows (66 Stat. 280, 8 U. S. C. 1101, Note):

"(b) Except as otherwise specifically provided in title III, any petition for naturalization *heretofore filed* which may be *pending at the time this Act shall take effect* shall be heard and determined in accordance with the requirements of law in effect when such petition was filed." [Emphasis added. The petition in *Menasche* was not "heretofore" filed, but filed subsequent to the effective date of the Act.]

405 (a) and that, since Menasche's petition for naturalization had not been filed and was not pending when the 1952 Act took effect, the prior law did not apply to his case under 405 (b). This Court did not regard the language of Section 405 (b) as sufficiently explicit to warrant the implication that all petitions for naturalization were outside the scope of Section 405 (a).

In *Shomberg* (348 U. S. 540), on the other hand, the Court had before it Section 318 of the 1952 Act (providing for the deferring of consideration of a petition for naturalization pending disposition of deportation proceedings) which, in terms, was to apply notwithstanding the provisions of Section 405 (b). It did not, with any similar specificity, exclude Section 405 (a), the general savings clause, which "embrace[d] rights under pending petitions" (348 U. S. at 545).[6] The Court nevertheless held Section 318 applicable to a petition for naturalization filed before the effective date of the Act, stating that, although Section 405 (a) was not expressly excluded and perhaps should have been by the draftsmen, nevertheless "their intent is plain enough" (348 U. S. at 545).

There is, accordingly, no overriding requirement for

---

[6] Section 318 is as follows (66 Stat. 244, 8 U. S. C. 1429):

"* * * Notwithstanding the provisions of section 405 (b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability, pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act * * *."

express reference to the savings clause, so long as the purpose "is plain enough." It is not necessary, in order to effect a statutory exemption, that the Congress employ any particular "magical passwords" (*Marcello* v. *Bonds*, 349 U. S. at 310). In this case, the statutory language is clearer and more precise, as to its intent to apply to prior convictions, than the terms before the Court in *Shomberg*. That decision is, therefore, controlling here.

Such, indeed, is the implication of this Court's decision in *Marcello* v. *Bonds*, 349 U. S. 302, involving an alien who had been convicted in 1938 of violation of the Marihuana Tax Act, 26 U. S. C. 2591. Subsequent to enactment of the 1952 Act, he was ordered deported under the same provision which is involved here. The Court stated (349 U. S. at 303):

> Section 241 (a) (11) of the 1952 immigration law makes such conviction *at any time* ground for deportation, and § 241 (d) provides that the deportation provisions of § 241 (a) shall apply even though the facts giving rise to the alien's deportability occurred prior to the date of enactment of the 1952 Act. [Emphasis is that of this Court.]

While the decision was directly addressed to issues other than the impact of the savings clause, the assumption that the statute had been properly interpreted as retrospective was implicit in this Court's holding that the statute, when applied retrospectively to a pre-1952 crime, was not an *ex post facto* law (349 U. S. at 314). Had there been any serious doubt of the retrospective nature of the statute, presumably this Court would not have reached the con-

stitutional issue which it decided. The record clearly presented the savings clause question, for it had been squarely raised before the Board of Immigration Appeals,[7] and was specifically presented to this Court in a supplemental petition for a writ of certiorari, embodying extensive argument (No. 145, 1954 Term, Supp. Pet. 7–17).[8] The supplemental petition was denied (348 U. S. 805), but Marcello again brought the issue before this Court in his brief on the merits, conceding that if the Court reached the constitutional *ex post facto* question it would necessarily sustain by implication the retroactive construction of the statute (No. 145, 1954 Term, Pet. Br. 42). In reply, the Government, without addressing itself to any impli-

[7] The extensive disposition of the point by the Board was before this court both in the record (No. 145, 1954 Term, R. 56–57) and in a special appendix to the petition for certiorari (pages XXI–XXII):

> It is also argued by the respondent's counsel that Section 241 (a) (11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. *We agree that the savings clause contained in Section 405 (a) of the Immigration and Nationality Act is very broad.* Yet counsel has not cited any specific language in that Section on which they desire to place reliance. Our examination of Section 405 (a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that *the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241 (d) does, in fact, specifically provide* * * *. [Emphasis added.]

[8] The Government opposed the supplemental petition on the ground that the two lower court decisions principally relied upon in the supplemental petition involved distinguishable statutory language and facts.

cation that would arise from this Court's reaching the *ex post facto* issue, pointed out *inter alia* that Section 241 (d) would not be affected by the savings clause. The *Marcello* decision cannot be brushed aside, as it was by the court below, with the phrase that *Marcello* "is not concerned with the savings clause" (R. 25).[9]

The importance of the *Marcello* decision to the issue presented here was recognized in *Gagliano* v. *Bonds*, 222 F. 2d 958, 959 (C. A. 5), sustaining the deportation of an alien, as here, by reason of conviction of a narcotics violation prior to the 1952 Act. The court rejected the alien's savings clause argu-

[9] *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759 (C. A. 8), relied upon by the court below in its *Carson* opinion, 228 F. 2d 142, also pending on writ of certiorari, this Term in No. 72, involved a different problem. It was whether under the 1952 Act a narcotics offense was to be considered solely as a narcotics offense or also as an offense involving moral turpitude. Subsection (b) of Section 241 of the Act provides that deportation shall not take place with respect to an offense specified in subsection (a) (4) (*i. e.*, a crime involving moral turpitude) if there has been an unconditional pardon or a recommendation against deportation by the sentencing judge. At the same time, subsection 241 (a) (11) provides that deportation shall take place in the case of a narcotics offender, and the offense under this subsection (11) is *not* designated as an offense for which, under subsection (b), a pardon or recommendation will prevent deportation. The court in *DeLuca*, with frank uncertainty (213 F. 2d at 764–765), adopted the view that the implication from subsection (11) was not sufficiently strong to outweigh the broad language of subsection (b). Congress has since corrected what it deemed to be an erroneous interpretation (see S. Rep. 1997, H. Rep. No. 2546, 84th Cong., 2d Sess.) by adding to Section 241 (b) the specific sentence: "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section" (Pub. L. 728, 84th Cong., 2d Sess., Sec. 301 (c)).

ment on the ground that, "Unfortunately for appellant, we think that issue also, whether formally presented and argued or not, was implicitly foreclosed by the Marcello decision, and, hence, is no longer open for decision by this Court." This Court denied certiorari. 350 U. S. 902.

The restrospective nature of the instant deportation provisions of the 1952 Act has also been noted by other courts of appeals in other contexts. In *Wong Kay Suey* v. *Brownell*, 227 F. 2d 41 (C. A. D. C.), certiorari denied, 350 U. S. 969, holding that Section 360 (a), concerning declaratory judgments, was limited by the savings clause, the court (per Edgerton, J.), stated (p. 43): "* * * At several points in the 1952 Act, exceptions to the general principle of the savings clause are so *specifically expressed* as to make § 360 (a) seem, by comparison, to fall short of 'specifically' providing an exception. *For example*, *§ 241 (d)*, 66 Stat. 208, 8 U. S. C. A. § 1251 (d), enacts that 'the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated [as deportable] in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act.'". (Emphasis added.) Similarly, in *Pino* v. *Nicolls*, 215 F. 2d 237, 246 (C. A. 1), reversed on other grounds, *sub nom*, *Pino* v. *Landon*, 349 U. S. 901, the court (per Magruder, J.) held that Section 241 (d) "lays to rest any possible doubt" that the deportation grounds set forth in Section 241 (a) were to have a retrospective effect.

The clarity of Section 241 (d) in expressing the congressional purpose is, in itself, a complete answer to the contention that respondent cannot be deported for a crime committed before 1952. Under the 1952 Act, if the intervening record of an alien offender in respondent's circumstances discloses genuine reform, that fact must be proved affirmatively in proceedings provided under other portions of the Act, *e. g.*, the provision for suspension of deportation (Section 244). But the general language of the savings clause cannot be used to erect an absolute bar to his deportation.

B. *The legislative history confirms the congressional purpose to render prior narcotics convictions a present basis for deportation.*

In the face of the clarity of the language of Section 241, and especially that of subsection 241 (d) providing that the alien shall be deported "notwithstanding" that the facts upon which deportation is based occured prior to the enactment of the Act, it is not surprising that no pertinent legislative history has been adduced to indicate any intent of Congress that those who avoided deportation or were not deportable under former statutes should be made immune from deportation under the 1952 Act by its general savings clause. Rather, the legislative history shows a recognition of the retrospective effect of the statute as to deportation.

The definitive early report of the Senate Committee on the Judiciary, prepared pursuant to a resolution to make an investigation of the immigration system (S. Rept. No. 1515, 81st Cong., 2d Sess.), recommended with respect to narcotics offenses (*id.* at 410):

> The subcommittee recommends that the immigration laws contain specific provision for the deportation of aliens who have been convicted of any law pertaining to narcotics. Such aliens should be deportable, whether the conviction occurred prior to or after entry into the United States. The deportable class will include those convicted under any law in this country pertaining to narcotics or under any such law of a foreign country.

The proposal contemplated virtually unlimited coverage of narcotics offenders, irrespective of place of offense, much less of length of time in the past.

The committees of both the Senate and House acknowledged consideration of analyses of drafts of the Act (S. 3455, 81st Cong., 2d Sess., and S. 716, 82d Cong., 1st Sess.) by the Immigration and Naturalization Service (S. Rept. 1137, 82d Cong., 2d Sess. 3; H. Rept. No. 1365, 82d Cong., 2d Sess. 27–28).[10] These analyses contemplated no exception to the retrospective aspect of the instant provisions, whether by the specific wording of the provisions or by the general language of the savings clause. Thus, the analysis of S. 716 says, in pertinent part, only that section 241 (a) (11) "appears to be a much more inclusive ground for deportation of persons who violate the narcotic laws than is contained in existing law" (p. 241–7). The analysis of S. 3455 discloses that the addition of the terms "status", "condition", and "right in process of acquisition" in the savings clause

[10] Copies of these analyses have been lodged with the Librarian of this Court for use in connection with this case and *Lehmann* v. *United States ex rel. Carson* (this Term, No. 72).

(their Section 361) was intended to resolve a conflict of decisions on a minor's derivation of citizenship through parental naturalization.[11] Of Section 241 (d), the analysis of S. 716 says (pp. 241–15, 16):

> This subsection makes aliens who fall within any of the classes enumerated in subsections (a) or (c) deportable without regard to the fact that the alien entered the United States before the enactment of this Act or that the facts which make him deportable occurred before that time. *This of course gives retroactive effect to the deportation provisions of this bill.* [Emphasis added.]

---

[11] The analysis, in pertinent part, is as follows (pp. 361–1, 2):

"This section is designed to replace section 347 and the last paragraph of section 504 of the 1940 Act. The section provides certain savings clauses in connection with preserving the validity of documents, liability for civil and criminal proceedings, and other matters set forth in the draft, after the bill takes effect.

"Subsection (a) will replace section 347 (a) of the 1940 Act. The interpretation of the savings clause in section 347 (a) has been the subject of divergent court decisions and an attempt has been made in this draft to clarify the meaning of the provision. The court decisions in question are *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. (2d) 449; and *Bertoldi v. McGrath*, 178 F. (2d) 977. The addition of the words 'status' and 'condition' on line 2, page 241 of the bill is an obvious attempt to overcome the decision in the *Aberasturi* case. The Service believes that the addition of these words is desirable, since the *Aberasturi* decision was contrary to the Service views of the proper interpretation of section 347 (a) of the 1940 Act. The decision in the *Bertoldi* case, however, was in line with the Service viewpoint. It is further recommended that, in addition, there be added following the word 'condition' on line 2, page 241, the words 'right in process of acquisition,'. It is believed that it would also be desirable to add following 'suits' on line 4, page 241, the language 'actions, proceedings, statuses, conditions, rights,'."

See *United States* v. *Menasche*, 348 U. S. 528, 533–535. The matter is further discussed in Point II, *infra*, pp. 25–26.

As pointed out in the Government's brief (pp. 13–16) in the companion case of *Lehmann* v. *United States ex rel. Carson*, No. 72, even with respect to the former five-year limitation on deportation of stowaways, there was explicit recognition in the analyses that the new deportation provisions would operate retrospectively.

In the final Senate committee report on the present legislation, it was specifically stated (S. Rept. No. 1137, 82d Cong., 2d Sess. 22):

> Unless otherwise specifically provided in the bill, an alien will fall within the deportable classes * * * regardless of whether the facts, by reason of which the alien belongs to a deportable class, occurred prior to the enactment of the bill. *Deportation proceedings are not criminal in nature, and, therefore, the ex post facto limitations in the Constitution are not applicable to the retroactive features of the provisions.* [Emphasis added.]

With respect to the savings clause, the report only stated (*id.* at 50): "Section 405 [then 404] contains the savings clauses." The very brevity of such treatment is an indication that this clause was not to have the far-reaching effect now sought to be ascribed to it.

The House committee report contains an illuminating statement of policy (H. Rept. No. 1365, 82d Cong., 2d Sess. 6):

> Although an alien who had acquired residence in this country was entitled to the same protection of life, liberty, and property as a citizen, he acquired no vested right to remain and the Government has power to deport him if, in the

> judgment of Congress, public interests so required, and such power is not dependent upon the existence of statutory conditions as to his right to remain at the time he became a resident. An alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of our Government.

The House report (*id.* at 61) did not summarize the retrospective effect of Section 241 (d) in the manner of the Senate report, *supra*. However, with respect to the savings clause, the committee discussed other aspects of the operation of the clause, stating that the provision was assumed to cover applications for suspension of deportation and for adjustment of status (*id.* at 90). The report evidences no understanding that the clause would in any respect override the express retrospective provisions of Section 241 (d) (*id.* at 90).

Taken as a whole, the legislative history confirms the intent, so clearly indicated by the language of the statute, that convictions for narcotic offenses prior to 1952 constitute a present basis for deportation.

II

THE MERE FAILURE OF CONGRESS PRIOR TO 1952 TO PROVIDE FOR DEPORTATION WITH RESPECT TO A CERTAIN OFFENSE DOES NOT CREATE A "STATUS" OF NONDEPORTABILITY PROTECTED BY SECTION 405 (a) OF THE 1952 ACT

In the foregoing discussion, it has been assumed, for the purpose of argument (see p. 11, *supra*), that the respondent has some form of "status" within the meaning of Section 405 (a). And it has been demon-

strated, we believe, that even upon such assumption the retrospective nature of Section 241 (a) (11), especially when coupled with Section 241 (d), is so specific and emphatic that the savings clause by its own terms (where "otherwise specifically provided" elsewhere in the Act) does not apply. In this portion of the brief, we challenge the validity of the assumption that respondent had some form of "status" within the meaning of Section 405 (a). The Court, of course, need not consider this second issue if it accepts our contention as to the specifically retrospective nature of the deportation ground involved here.

The savings clause, Section 405 (a), provides in pertinent part for the preservation of "any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect." As this Court recognized in *United States* v. *Menasche*, 348 U. S. 528, 533–535, the addition in the 1952 Act of the terms "status", "condition", and "right in process of acquisition" was intended to resolve an inter-circuit conflict of decisions by endorsing the prior holding of *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C. A. D. C.), that a child of a naturalized parent would become a citizen upon five years of residence, irrespective of a later enactment requiring both parents to be naturalized. See *supra*, pp. 21–22. It is, of course, settled that the 1952 extension of Section 405 (a) is not limited to situations concerning derivative citizenship, even though the immediate

reason for the change lay in that area. *United States* v. *Menasche, supra,* at 535. But this legislative history of the 1952 extension of the savings clause is at least indicative of the general type of "status", "condition", and "right in process of acquisition" which Congress intended to be preserved by the added language. In our view, the change was made to protect those aliens who had gone at least part way toward satisfaction of the requirements set forth by Congress with respect to certain privileges relating to immigration and naturalization. In short, in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application. As the Court stated in the *Menasche* case (p. 535): "[t]he change in the section * * * embodies, we believe, congressional acceptance of the principle that the statutory status quo was to continue *even as to rights not fully matured*" (emphasis added). Thus, in the *Menasche* case, involving a specific provision permitting naturalization upon the completion of certain steps and a specified period of residence, it could be said that an alien who had applied for naturalization under this enactment and who had already put in a number of years of residence possesses a "right in process of acquisition".

By contrast, in the instant case, there has been no affirmative extending of a privilege to an alien by Congress, but rather the mere failure of Congress during the earlier time to provide for deportation with respect to certain offenses, including that for which respondent was convicted. Plainly, respondent's pre-1952 crime did not constitute a step toward the acqui-

sition of any right or privilege. His situation is in no way comparable to that affirmatively accorded by Congress in connection with naturalization of a parent (as in *Bertoldi*) or an alien's taking out his first naturalization papers (as in *Menasche*). Both the earlier provisions as to derivative citizenship and as to naturalization provision are very different from a mere failure to make any provision, as here. Such congressional inaction cannot be construed as some kind of general amnesty with respect to past misconduct or as an award of a comparable status. At most, Congress simply did not see fit prior to 1952 to enlarge the scope of the categories of deportable persons to include those in respondent's circumstances. But this Court has repeatedly held that the alien derives nothing from the fact that Congress has not heretofore chosen to attach the consequence of deportation to an alien's previous conduct; Congress can act, and act retroactively, at a later time. *Galvan* v. *Press*, 347 U. S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 595; *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529; *Mahler* v. *Eby*, 264 U. S. 32, 39–40; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280; *Marcello* v. *Bonds*, 349 U. S. 302.

In holding that respondent had a status of nondeportability, the court below relied on two decisions. Neither, we believe, is persuasive. In *Lehman* v. *United States ex rel. Carson*, this term, No. 72, the essence of the situation prior to enactment of the 1952 Act was that Carson had illegally entered the United States and been convicted of crimes. For these acts, he could not then be deported, for Congress

had excluded as grounds for deportation an illegal entry undetected for five years and an offense for which a pardon had been granted. As discussed in our brief in No. 72, we think such congressional action did not constitute the affirmative creation of a status within the meaning of the savings clause. Nevertheless, Congress at least came closer to the affirmative grant of a status in the *Carson* situation than here, so that, even if it were concluded that Carson possessed such a status, the decision would not be controlling with respect to the instant case.

United States ex rel. DeLuca v. *O'Rourke*, 213 F. 2d 759 (C. A. 8), the other decision relied upon below (R. 23–24), deals with an offense for which there could formerly be no deportation because of the recommendation against deportation by the sentencing judge. Whatever the validity of the decision (see fn. 9, *supra*, p. 18), the situation is, like *Carson*, *supra*, far removed from the instant one in that at least some affirmative action of Congress may perhaps be found in its specific provision with respect to a judge's recommendation against deportation.[12]

---

[12] The court in *DeLuca* also appeared to rely somewhat (213 F. 2d at 764) upon the provision of the savings clause that nothing in the Act should be construed to affect the validity of any "document," or to affect any "act * * * *done or existing*" at the time the new Act took effect. We question the applicability of the quoted language even in *DeLuca*, for the "validity" of no document is being affected when that document (presumably the recommendation against deportation) was always to be effective only so long as the then immigration legislation was effective. In any event, no document is outstanding with respect to the offense below or with respect to the illegal entry in *Carson*.

The legislative history of Section 241, as we have shown (*supra*, pp. 20–24), indicates a controlling purpose to make the provision retrospective. There is no indication that Congress contemplated that any "status" had been acquired by the earlier failure to make an offense a ground for deportation. On the contrary, as already pointed out (*supra*, pp. 23–24), the House committee(H. Rept. No. 1365, 82d Cong., 2d Sess., 6) emphasized that an alien "acquired no vested right to remain and the Government has power to deport him if, in the judgment of Congress, public interests so required, and such power is not dependent upon the existence of statutory conditions as to his right to remain at the time he became a resident." Nothing in the legislative history of the Act nor in the language of the savings clause indicates that any "vested right" with respect to deportation was thought to have accrued to an alien in connection with his commission of an offense. In appropriate and specific clauses, Congress did recognize that an offender may have reformed and that relief in certain cases may be warranted (see p. 20, *supra*). The offender of yesterday was not, however, accorded a status absolving him from liability to deportation.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

FEBRUARY 1957.